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DATE ISSUED: April 10, 2000

CASE NOS.: 1999-ERA-00014
1999-ERA-00015

In the Matter of

SHAE HEMINGWAY and
BILL HAWKINS
Complainants

v.

NORTHEAST UTILITIES, NORTHEAST NUCLEAR ENERGY COMPANY, BARTLETT NUCLEAR , INC., and CONNECTICUT YANKEE ATOMIC POWER COMPANY
Respondents

RECOMMENDED DECISION AND ORDER ON RECONSIDERATION GRANTING RESPONDENTS' MOTIONS FOR SUMMARY DECISION

This proceeding arises under the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. §5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The matter is before me on motions filed by Respondents Northeast Utilities ("Northeast"), Northeast Nuclear Energy Company ("NNECO") and Connecticut Yankee Atomic Power Company ("Connecticut Yankee") for reconsideration of an October 6, 1999 order issued by Administrative Law Judge Lawrence P. Donnelly denying Respondents' motions for summary judgement. The matter was reassigned to me for adjudication due to Judge Donnelly's retirement.

I. Background

On December 31, 1998, the Complainants, Shae Hemingway ("Hemingway") and Bill Hawkins ("Hawkins") filed a complaint with the Department of Labor, Occupational Safety and Health Administration ("OSHA") alleging that the Respondents had harassed, intimidated and discriminated against them in violation of the employee protection provisions of the ERA. More particularly, Hemingway and Hawkins alleged that they raised concerns in their capacity as Health Physics Technicians at the Connecticut Yankee Nuclear Power Plant over violation of health physics procedures in connection with a dive into a pool of radioactive water known as the

transfer canal on December 9, 1996 and that they subsequently testified to the Nuclear Regulatory Commission ("NRC"), a Department of Labor Administrative Law Judge and company officials concerning this incident and an alleged attempt by management officials to coverup a release of radioactive materials. Complaint at ¶¶ 22-39. The Complainants further alleged that Hawkins was laid off between January and June 1997 and that both employees were subjected to harassment and discrimination because of their protected activities. Complaint at ¶¶ 40-62. Finally, Hemingway and Hawkins alleged that Respondents Connecticut Yankee and Northeast refused to hire them and instead hired others as full-time employees in late June or early July 1998 and that they have been subjected to a continuing pattern of harassment, intimidation and adverse treatment. Complaint at ¶¶ 63-68. At the request of the OWCP, counsel to the Complainants submitted a Supplemental Statement of Facts on March 5, 1999. In pertinent part, the supplemental statement alleges:

> 1. In the first week of July 1998, Hawkins and Hemingway received formal notice in letters dated June 29, 1998 that the House job was not awarded to either Hawkins or Hemingway. CY management did not announce or make formal confirmation of the successful candidate until approximately July 10th, when Doug Roberson was seen with House staff identification papers. In all discussions regarding the position, the individual hired was not identified by CY management.
> 2. In mid-July (some time after July 10, 1998), Bill Hawkins was transferred out of the Health Physics Department and into the Radiation Engineering area.
> 3. Mr. Hawkins' transfer was a deliberate action to remove him from the protected activity he was involved in, in insisting upon procedural compliance in the Health Physics Department.
> 4. Rick Gault notified Mr. Hawkins of the transfer with Rich McGrath, the Radiation Engineering Manager. Mr. Hawkins had sought a transfer from the H.P. Department to remove himself from the acts of Mr. Gault, which were adverse to Mr. Hawkins.
> 5. In the Radiation Engineering Department, Mr. Hawkins has continued to be criticized by Mr. Gault when Mr. Hawkins has called upon Mr. Gault to take appropriate action (i.e. ACR -Discipline) for H.P. Technicians' failure to comply with Rad Safety Reviews drawn by Mr. Hawkins.
> 6. Mr. Hawkins has suffered the chilling effect of the failure of CY management to support his Radiation Engineering activities and safety concerns from July 1998 through the present time.
> 7. In July 1998, Bill Hawkins was assigned by Mr. Gault to enter the pipe trench area where a several thousand gallons chemical spill had occurred. The area was dangerous, with excessive heat, high radiation, high contamination requiring respirator and plastics suiting. This was an H.P. job to which Mr. Hawkins was assigned despite his transfer to the Rad Engineering Group, and CY management failed to have an appointed safety team in place for this assignment. Mr. Gault assigned Mr. Hawkins to this task and, when sending Mr. Hawkins into this area, he knew the safety team was not appropriately in place. An ACR was written

regarding this activity. Thirty H.P. Technicians were on staff at this time and could have handled this assignment rather than Mr. Hawkins.

* * * * *

9. After Mr. Gault assigned Mr. Hawkins to investigate the pipe trench, he assigned Mr. Hemingway on a continuing basis to work in the pipe trench - this was the hottest, most radioactive, most chemically contaminated area ever experienced as a CY chemical decon work area.

10. From mid-July through September 1998, Mr. Hemingway was assigned many hours of work including extraordinary overtime hours in the adverse conditions in the pipe trench. Mr. Hemingway was also assigned backup to Mr. Hawkins during the initial exploratory of the pipe trench spill and R.H.R. pit area (140' heat). No safety team was assigned to Hemingway's subsequent activity in these hazardous areas (ARC-98-0628, 0645, 0656).

* * * * *

13. During the summer through September 1998, Mr. Hemingway was not trained for Shift Qualification, despite his request and other employees (Doug Roberson) receiving the training.

* * * * *

15. In September 1998, Mr. Hemingway was assigned by Rick Gault to survey in the boneyard where no power, heat or light were available due to Rick Gault having stonewalled the work orders to install power to the site.

16. In January 1998, Mr. Hemingway asked for vacation time and did not receive any vacation until December 1998, while others were given vacation. In September 1998, Mr. Hemingway was scheduled for a day off on Friday, but Mr. Gault scheduled Mr. Hemingway for a fire drill and refused to reschedule.

17. Other, newer employees in the H.P. Department were given days off in weeks Mr. Hemingway was denied days off.

18. From September 1998 through December 1998, Mr. Hemingway was continuously assigned to work in the boneyard without heat.

19. In September 1998, Mr. Hemingway was finally shift qualified, but has only been assigned to the shift for one day while other, lesser qualified, newer employees such as Cindy Pye, have been assigned to shift duty. Mr. Hemingway has never been paid extra pay for shift qualification, despite complaints to Rick Gault.

20. On information and belief, these actions by Rick Gault have been in retaliation for the protected activities by Hemingway and Hawkins.

By letters dated April 5, 1999, the OSHA Area Director for Hartford notified the parties of the results of OSHA's investigation. Initially, he dismissed the complaint against the Respondent Bartlett Nuclear, Inc. ("Bartlett"), finding that none of the allegations pertained specifically to Bartlett. The Area Director next determined that the January 1997 notice of lay-off and the denial of employment in 1998 constituted separate and discreet actions which had not been timely raised in the complaint within 180 days. In this regard, the Area Director found that,

prior to the issuance of the June 29, 1998 rejection letters, the Complainants had attended a meeting at which they were informed of their non-selection as well as the identity and qualifications of the selectee. Finally, the Area Director found that certain allegations in the complaint were continuing in nature and were timely filed, but he concluded that the information obtained during the investigation was insufficient to demonstrate that a continuing violation had occurred or that a discriminatory policy or practice existed.

The Complainants timely appealed the Area Director's decision and requested a formal hearing by letter dated April 13, 1999 to the Chief Administrative Law Judge. The matter was assigned to Judge Donnelly who scheduled a hearing to commence on July 12, 1999. Connecticut Yankee then moved for a continuance, citing the need for additional time to complete discovery, and Judge Donnelly rescheduled the hearing to October 12, 1999.

Following a series of procedural orders concerning discovery issues and the time frame for filing dispositive motions, Northeast and NNECO and Connecticut Yankee filed motions for summary decision. In their motion, filed on September 7, 1999, Northeast and NNECO asserted that they were never in an employment relationship with and never took any adverse employment action with respect to either Hemingway or Hawkins. Rather, Northeast and NNECO averred that Northeast is a business trust with no employees, that Hemingway and Hawkins were employed by Bartlett to work under contract with Connecticut Yankee at the Connecticut Yankee plant, and that both Complainants acknowledged at their depositions that none of the individuals charged with engaging in adverse actions against them were employees of either Northeast or NNECO. Northeast/NNECO Motion for Summary Decision at 3. On these undisputed facts, Northeast and NNECO argued that they are not proper respondents and should be dismissed. *Id*. at 4-8.

In separate motions for summary decision which were filed on September 3, 1999,[1] Connecticut Yankee asserted that there are no genuine issues of material fact and that it is entitled to summary decision as a matter of law on the following grounds: (1) that all of the allegations in the complaint and supplemental statement of facts are time-barred in that every one of the alleged retaliatory acts is a discrete act which occurred more than 180 days prior to the filing of the complaint; (2) that the Complainants can not establish a prima facie case of retaliation; and (3) even assuming that the Complainants have established a prima facie case,

[1] Connecticut Yankee filed separate motions for summary decision and separate supporting briefs, one directed to Hemingway and the other to Hawkins. Both motions are treated herein collectively as they rest on essentially identical grounds.

Connecticut Yankee has proffered legitimate, non-discriminatory reasons for its actions and the Complainants can not establish pretext. Connecticut Yankee Motions for Summary Decision at 1-2.

On October 1, 1999, the Complainants filed responses opposing both motions for summary decision. With regard to the Northeast/NNECO motion, the Complainants stated that they were employed by Bartlett as Health Physics Technicians working at the Connecticut Yankee Atomic Power Plant with responsibility for measuring radiation levels for personnel and environmental protection purposes. Citing appended Northeast documents including Northeast's 1995 annual report, the Complainants asserted that Northeast owns an interest in eight nuclear power plants including the Connecticut Yankee plant and was involved in the operation or management of the Connecticut Yankee plant during certain times involved in the complaint. The Complainants further stated that after they were requested to testify before state and federal agencies concerning radiological practices at the Connecticut Yankee plant, they were treated in a derogatory manner, given poor job assignments and treated adversely by management of Northeast and Connecticut Yankee. Finally, the Complainants stated that they had complained to Northeast management regarding their treatment and that Northeast had sent in a team to investigate their complaints and resolve the issues they had raised.

In response to Connecticut Yankee's motion, the Complainants submitted affidavits which essentially reiterated the allegations in their complaint and supplemental statement of facts. Regarding their non-selection by Connecticut Yankee for full-time Health Physics positions, the Complainants stated that they were informed on June 29, 1998 that they had not been selected and that they learned on or about July 10, 1998 that Doug Roberson had been hired instead of them. Complainants' Response to Connecticut Yankee Motion at 8; Hawkins Affidavit at ¶¶ 37-37; Hemingway Affidavit at ¶¶ 32-33. The Complainants also reiterated their allegations that they continued to suffer retaliation and discrimination between July 1998 and December 1998 by Connecticut Yankee supervision and management. Complainants' Response to Connecticut Yankee Motion at 8-12.

On October 6, 1999, Judge Donnelly issued an order denying Respondents' motions for summary decision finding that counsel for the Complainants had raised questions of fact sufficient to render the motions for summary decision premature. On October 8, 1999, Connecticut Yankee filed a reply brief in support of its motion for summary decision, stating that

the reply brief was timely filed pursuant to the mutual agreement of the parties.[2] By letter dated October 12, 1999, Connecticut Yankee requested that Judge Donnelly reconsider his October 6, 1999 order denying its motion for summary decision in light of its timely filed reply brief which asserted the following arguments: (1) that the Complainants can not meet their evidentiary burden by simply recasting their complaint in the form of "sham" affidavits; (2) the Complainants' claims are time-barred and do not amount to a continuing violation; (3) the Complainants have absolutely no evidence to support their claims and have failed to rebut the legitimate, non-discriminatory reasons proffered by Connecticut Yankee for its employment actions; and (4) the Complainants' response to the motion for summary decision should not be considered because it was filed out of time without an extension from the Court or consent from the parties. On October 13, 1999, Northeast and NNECO filed a motion for reconsideration of the October 6, 1999 order denying their motion for summary decision, and they also filed a reply brief stating that they were in the process of preparing their reply to the Complainants' response when the October 6, 1999 order was received.

II. Discussion, Findings of Fact and Conclusions of Law

As Judge Donnelly did not rule on the Respondents' motions for reconsideration prior to his relinquishing jurisdiction over the cases, the matters are now properly before me for adjudication. For the reasons which follow, I have determined that reconsideration is warranted.

A. Standard for Summary Decision

The standard for granting summary decision in matters arising under the ERA is set forth at 20 C.F.R. §18.40(d). This section, which is derived from Fed. R. Civ. P. 56, permits an administrative law judge to recommend summary decision where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Gillilan v. Tennessee Valley Authority*, 91-ERA-31 and 34 (Sec'y August 28, 1995), slip op. at 3. While summary decision is permitted under section 18.40(d), the Secretary of Labor has cautioned that summary procedures are to be used sparingly in ERA whistleblower litigation where motive and intent play lead roles and where the presence or absence of a retaliatory motive most often must be proved by

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[2] In this regard, it appears that the parties had agreed to certain pre-hearing time frames for completion of discovery and the filing of motions for summary decision, responses thereto and reply briefs. This apparent agreement is reflected in a letter dated August 26, 1999 from counsel for Connecticut Yankee to counsel for the Complainants which stated that Connecticut Yankee would file its dispositive motion on or before September 7, 1999, that the Complainants would have 20 days or until September 27, 1999 to file their response, and that Connecticut Yankee would file any reply on or before October 4, 1999. By letter dated September 23, 1999, counsel for the Complainants advised counsel for Connecticut Yankee that he would be filing the Complainants' response to the motions for summary decision on October 4, 1999 as two pages that were missing from the briefs in support of the motions were not received until September 13, 1999.

circumstantial evidence and the inferences drawn therefrom. *Richter v. Baldwin Associates,* 84-ERA-9 and 10 (Sec'y March12, 1986), slip op. at 8, citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Thus, in determining whether a genuine issue of material fact exists, the evidence and factual inferences must be viewed in the light most favorable to the non-moving party. *Gillilan*, slip op. at 3. *See also, OFCCP v. CSX Transp.,Inc.*, 88-OFC-24 (Asst. Sec'y October 13, 1994), slip op. at 12; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). However, where a party moving for summary decision has met its burden of showing that there is no genuine issue of material fact, an opposing party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec.*, 475 U.S. at 574. Further, it is not enough for the opposing party to rest upon mere allegations or denials of its pleading, but it rather must set forth specific facts showing that there is a genuine issue for the hearing. 18 C.F.R. §18.40(c)*; Trieber v. Tennessee Valley Auth.*, 87-ERA-25 (Sec'y September 9, 1993), slip op. at 5, quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-57 (1986); *Foster v. Arcata Associates, Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). The opposing party's evidence, if accepted as true, must support a rational inference that the substantive evidentiary burden of proof could be met, and where an opposing party "presents admissible direct evidence, such as through affidavits, answers to interrogatories, or depositions, the judge must accept the truth of the evidence set forth; no credibility or plausibility determination is permissible." *Webb v. Carolina Power & Light Co.*, 93-ERA-42 (Sec'y July 14, 1995), slip op. at 3. With these guidelines in mind, I will turn now to the issues raised by the Respondents' motions for summary decision and the Complainants' responses in opposition.

B. Northeast and NNECO

Northeast and NNECO contend that they should be dismissed as a matter of law because they had no employment relationship with the Complainants and because no special circumstances have been established for holding them liable for conduct of Connecticut Yankee which the Complainants have alleged to be in violation of the ERA. Rather, these parties contend that they are, respectively, a business trust whose assets consist exclusively of stock including a minority share in Connecticut Yankee and a service corporation which has provided various administrative services to Connecticut Yankee under contract. Northeast/NNECO Brief in Support of Motion for Summary Decision at 1-2; Comendul Affidavit at 3-4.[3] In their response, the Complainants assert that "as NU [Northeast] managed the operation of the Connecticut Yankee Atomic Power Plant for a period of time involved in the Complaint, and thus participated in and influenced the employment practices of Connecticut Yankee Atomic Power Company towards Bill Hawkins and Shae Hemingway, there is no basis to dismiss this action against Northeast Utilities and Northeast Nuclear Energy Company." Complainants' Brief in Opposition to Northeast/NNECO Motion for Summary Decision at 6-7.

[3] The affidavit of O. Kay Comendul, Assistant Secretary of Northeast Utilities and Northeast Utilities Service Company ("NUSCO"), refers to NUSCO but not NNECO. It appears that NUSCO and NNECO are one and the same.

The existence of an employment relationship between a complainant and a respondent is an essential element of a valid claim under the ERA. *Varnadore v. Oak Ridge National Laboratory* (*Varnadore III)*, 95-ERA-1 (ARB June 14, 1996) Slip op. at 36-37 (affirming summary dismissal of respondents who were merely parent companies of the entity which employed the complainant). However, the ARB has held that a parent company may be held liable for violations of the ERA when it acts in the capacity of an employer toward an employee of a subsidiary:

> [I]n a hierarchical employment context, an employer that *acts* in the capacity of employer with regard to a particular employee may be subject to liability under the environmental whistleblower provisions, notwithstanding the fact that employer does not directly compensate or immediately supervise the employee. A parent company or contracting agency acts in the capacity of an employer by establishing, modifying or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. For example, the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions.

Stephenson v. National Aeronautics & Space Administration, 94-TSC-5 (ARB February 13, 1997), slip op. at 3 (italics in original).

Here, the Complainants have alleged without specification or supporting evidence that Northeast was involved in the management of the Connecticut Yankee plant and that it participated in and influenced Connecticut Yankee's employment practices. They have neither alleged nor presented any evidence that either Northeast or NNECO established, modified or otherwise interfered with them regarding their compensation, terms, conditions or privileges of employment. Their affidavits do not identify any conduct by Northeast or NNECO aside from investigating their complaints, and they admitted in their deposition testimony that none of the individuals whom they have accused of engaging in adverse employment actions are employed by Northeast or NNECO. Hemingway Deposition at 232-238; Hawkins Deposition at 320-321. Indeed, Hemingway conceded during his deposition that he didn't know what type of entity Northeast is or whether NNECO has anything to do with Connecticut Yankee. Hemingway Deposition at 232-233. In the absence of any facts which, when viewed in a light most favorable to the Complainants would support a finding that Northeast or NNECO interfered in the Complainant's employment at Connecticut Yankee, I find that the Complainants have presented no genuine issue of material fact for hearing and that Northeast and NNECO are, therefore, entitled as a matter of law to a judgement dismissing them as respondents to this matter. *Freels v. Lockheed Martin Energy Systems, Inc*., 94-ERA-6, 95-CAA-2 (ARB December 4, 1996), slip op. at 9-10, *aff'd sub nom, Freels v. Secretary of Labor,* Nos. 97-3117 and 97-3883 (6th Cir. Oct. 17, 1997) (unpublished).

C. Timeliness

The employee protection provisions of the ERA, as amended, and the regulations implementing these provisions mandate that any complaint shall be filed in writing within 180 days after the occurrence of the alleged violation. 42 U.S.C. §5851(b)(1) (1994); 29 C.F.R. §§24.3(b). The limitation period begins to run on the date when facts which would support the discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his rights. *Ross v. Florida Power & Light Company*, 96-ERA-36 (ARB March 3, 1999), slip op. at 4; *McGough v. U.S. Navy*, 86-ERA-18, 19, and 20 (Sec'y June 30, 1988), slip op. at 9-10. In other words, the time period for filing an ERA complaint begins on the date that the employee is given final and unequivocal notice of the employer's employment decision; *Ross*, slip op. at 4; *English v. General Electric*, 85-ERA-2 (Under Sec'y January 13, 1987), slip op. at 6, *aff'd sub nom. English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988); not the point at which the consequences of the decision become painful to the employee. *Chardon v. Fernandez*, 454 U.S. 6, 9 (1981); *Delaware State College v. Ricks*, 449 U. S. 250 (1980).

There are, however, two recognized exceptions to the general rule that the limitations period begins to run from the date that a complainant learns of an employer's final decision. One exception is doctrine of "equitable tolling" under which the running of a limitation period can be tolled where a duly diligent employee is excusably ignorant of his or her rights. *See Lastre v. Veterans Administration Lakeside Medical Center*, 87-ERA-42, slip op. at 2-4 (Sec'y March 31, 1988); *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3rd Cir. 1981). The Complainants have not asserted that equitable tolling is applicable, and I find no facts alleged in their complaint, supplemental statement of facts, affidavits or deposition testimony that would support a finding that they were excusably ignorant of their rights to file a complaint alleging retaliation against them in violation of the ERA.

The other exception is the "continuing violation" doctrine under which a timely charge with respect to any incident of discrimination in furtherance of a policy of discrimination renders claims against other discriminatory actions taken pursuant to that policy timely, even if such claims, standing alone, would be untimely. *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89, 96 (2nd Cir. 1996); *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2nd Cir. 1993), *cert. denied*, 511 U.S. 1052 (1994). In *Connecticut Light & Power*, an ERA case, the Second Circuit held that a continuing violation exists where there is a relationship between a series of discriminatory actions and an invalid, underlying policy: "[t]hus, in cases where the plaintiff proves i) an underlying discriminatory policy or practice, and ii) an action taken pursuant to that policy during the statutory period preceding the filing of the complaint, the continuing violation rule shelters claims for all other actions taken pursuant to the same policy from the limitations period." 85 F.3d at 96. The challenged practice in *Connecticut Light & Power* involved a negotiation tactic employed over a period of months by which the respondent allegedly attempted to coercively induce the complainant into relinquishing or restricting his ability to communicate with federal regulatory agencies. The Court distinguished this type of conduct from a "discrete" employment decision and found the continuing violation exception applicable. *Id.* The Secretary of Labor has also recognized the continuing violation exception in cases "[w]here

the unlawful employment practice manifests itself over time, rather than as a series of discrete acts." *McCuistion v. Tennessee Valley Authority*, 89-ERA-6 (Sec'y November 13, 1991), slip op. at 8-9, citing *Waltman v. Intern. Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989). In *McCuistion*, the Secretary considered three factors to determine whether alleged violations were continuing in nature: (1) *subject matter* – do the acts involve the same type of discrimination, tending to connect them in a continuing violation?; (2) *frequency* – are the acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision?; and (3) *degree of permanence* – does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? Slip op. at 9 (citations omitted). Applying these factors, the Secretary found that challenged actions (a disciplinary letter, an unsatisfactory appraisal, a withheld pay increase, blacklisting, and termination) involved the same type of discrimination in retaliation for protected activities, and had recurred over a 12-month period. However, the Secretary further found that while these actions represented a continuing campaign of harassment against the complainant, the disciplinary letter and the unsatisfactory appraisal which effectively denied the complainant a pay increase were sufficiently permanent to trigger the complainant's awareness of the respondent's discriminatory motivation. Thus, the Secretary declined to apply the continuing violation exception to these discrete actions which had occurred outside of the limitation period. Slip op. at 10. However, the Secretary did note that "evidence of discriminatory actions antedating the filing period but found not to be continuing violations nevertheless may constitute relevant background evidence which may illuminate . . . present patterns of behavior." Slip op. at 10-11 (citation omitted).

After careful consideration of the complaint, the Complainants' supplemental statement of facts, their responses to the motions for summary decision and their affidavits and deposition testimony, I have determined that the lay-off of Hawkins from the Connecticut Yankee Plant in or around January 1997, the transfer of Hawkins from the Health Physics Department to the Radiation Engineering Department and Connecticut Yankee's failure to hire Hemingway and Hawkins as full-time Health Physics Aides in June 1998, like the disciplinary letter and unsatisfactory appraisal involved in *McCuistion*, were discrete actions and were sufficiently permanent to trigger the Complainants' awareness of the Respondents' discriminatory motivation. *See also, Gilillian v. Tennessee Valley Authority*, 92-ERA-46 and 50 (Sec'y April 20, 1995), slip op. at 3. As such, these actions may not be viewed as part of a continuing violation despite their relationship to an alleged pattern of unlawful discrimination and retaliation, and they may not form the basis for relief or a finding of a violation of the ERA unless they occurred within the limitation period which began on July 4, 1998, 180 days prior to the filing of the complaint on December 31, 1998.

With regard to the lay-off allegation, the undisputed evidence shows that Hawkins was laid off by as a Health Physics Aide at the Connecticut Yankee plant from January 31, 1997 to May 1997 when he was called back to work. Hawkins Deposition at 129, 137. Clearly, he had final and unequivocal notice of this action long before the commencement of the limitation period.

Accordingly, this allegation is time-barred, as is any allegation that Connecticut Yankee attempted to prevent Hawkins from returning to its plant (see Hawkins Deposition at 132-137).

The Complainants also concede that they knew that Connecticut Yankee had not hired them as full-time Health Physics Aides in late June 1998, but they argue that their complaint is timely with respect to this allegation because they did not know that Doug Roberson had been hired, and thus were not in a position to know the qualifications of the successful candidate, until after July 10, 1998. Complainant's Response to Connecticut Yankee Motion at 27-28, citing, *inter alia, Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450 (7th Cir. 1990) (discussing the "discovery rule" which postpones the beginning of a limitation period from the date a plaintiff is wronged to the date the plaintiff discovers that he or she has been wronged), *cert denied*, 501 U.S. (1991).[4] The Complainants' evidence shows that they were informed along with other applicants on June 29, 1998 that they had not been hired. Hemingway Affidavit at ¶ 32; Hawkins Affidavit at ¶ 36. The fact that this meeting took place on or before June 29, 1998 is confirmed by affidavits from Connecticut Yankee managers who conducted the meeting. Sexton Affidavit at ¶ 15; Sandowski Affidavit at ¶ 8. At their depositions, Hemingway and Hawkins testified that they learned that they had not been hired when they attended a meeting conducted by Connecticut Yankee managers with all of the applicants except for Doug Roberson. Hemingway Deposition at 182; Hawkins Deposition at 247. Hemingway further testified that the unsuccessful applicants assumed that Roberson had been selected because he was the only applicant who was not present at the meeting. *Id.* at 182. While the Complainants also assert that it was not until a week or two after the June 29, 1998 meeting that they received written notification that Roberson had been hired, their knowledge on June 29, 1998 that they had not been hired and that someone else had been hired was sufficient to trigger their awareness of a violation of their rights for purposes of commencing the limitation period. *See, Gilillian v. Tennessee Valley Authority*, 92-ERA-46 and 50 (Sec'y April 20, 1995), slip op. at 2 (complainant's knowledge that others had been selected for a position and that he had not was sufficient to start the limitation period, and the fact that he may not have discovered the *reason* for his no selection until a later date is "irrelevant"). Therefore, I find this allegation is untimely.

Finally, the undisputed evidence shows that, contrary to the allegation in the supplemental statement of facts that Hawkins was transferred from Health Physics to Radiation Engineering sometime after July 10, 1998, the transfer was effected on June 29, 1998. The undisputed evidence further establishes that Hawkins had final and unequivocal notice outside of the

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[4] As discussed above, the Administrative Review Board and Secretary of Labor have applied the so-called "discovery" rule by holding that the limitation period begins on the date when facts supporting a discrimination complaint were apparent or should have been apparent to a person similarly situated to the complainant with a reasonably prudent regard for his or her rights. *Ross v. Florida Power & Light Company*, 96-ERA-36 (ARB March 3, 1999), slip op. at 4; *Pantanizopoulos v. Tennessee Valley Authority*, 96-ERA-15 (ARB October 20, 1997), slip op. at 3-5; *McGough v. U.S. Navy*, 86-ERA-18, 19, and 20 (Sec'y June 30, 1988), slip op. at 9-10.

limitation period. In this regard, Hawkins testified at his deposition that he requested a transfer out of Health Physics and that he was "thrilled" to get the position in Radiation Engineering because he would be working for Rich McGrath and doing something else. He also acknowledged that the transfer to Radiation Engineering involved a promotion and a pay increase, and he testified that he learned of the transfer in a meeting with Rich McGrath. Hawkins Deposition at 142-145. Payroll records from Bartlett reflect that the pay increase from $23.50 to $28.00 per hour which Hawkins received in connection with the transfer to Radiation Engineering was effective on June 29, 1998. Connecticut Yankee Consolidated Exhibit Binder, Exhibit G. Taken together, this evidence convincingly establishes that Hawkins had final and unequivocal notice of the transfer by no later than June 29, 1998. Since the Complainants have offered no evidence to substantiate their claim in the supplemental statement of facts that Hawkins was not transferred until sometime after July 10, 1998, I find that the Complainants can not prevail in proving that their complaint is timely with respect to the transfer allegation.

On the other hand, I conclude that the remaining allegations in the complaint which pre-date the limitation period are continuing in nature in that they involve a similar subject matter (*i.e.*, workplace harassment, intimidation and discrimination), were recurring and lacked permanency of discrete actions such as lay-off, transfer or refusal to hire. Specifically, these alleged violations consist of harassment and intimidation of Hemingway and Hawkins by Connecticut Yankee supervisors and managers, disparate treatment of Hemingway in comparison to the three new Health Physics technicians, providing Hawkins with a cursory and discriminatory exposure review in July 1997, and treating Hemingway and Hawkins as outcasts and giving them adverse work assignments during August 1997. Complaint at ¶¶ 33, 44, 46-47, 48-51. Accordingly, these allegations may be considered provided that the Complainants prove that the Respondents maintained an underlying discriminatory policy or practice, and that there was an action taken pursuant to that policy during the statutory period preceding the filing of the complaint. *Connecticut Light & Power*, 85 F.3d at 96. In addition, there are several allegations, as quoted above from the Complainants' supplemental statement of facts which clearly post-date July 4, 1998 and are, consequently, timely. I will turn now to consideration of the motion for summary decision with respect to those allegations.

D. Alleged Retaliatory Acts within the Limitation Period

In order to prevail under the employee protection provision of the ERA, the Complainants must prove by a preponderance of the evidence that: (1) they engaged in activity protected by the ERA; (2) the Respondents took an adverse action against them; and (3) their ERA-protected activity was a contributing factor in the adverse action that was taken. *See Paynes v. Gulf States Utilities Co.*, 93-ERA-47 (ARB August 31, 1999), slip op. at 4; *Dysert v. Secretary of Labor*, 105 F.3d 607 (11th Cir. 1997); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386 (8th Cir. 1995).

Connecticut Yankee does not dispute that the Complainants engaged in activities protected by the ERA. Thus, the first element of their claim is established. As for adverse actions within the 180-day limitation period, the Complainants have alleged that: (1) they were

discriminatorily assigned to difficult and hazardous work in the pipe trench and RHR pit area; (2) Hemingway was not trained for shift qualification, despite his request and other employees (Doug Roberson) receiving the training; (3) Hemingway was assigned by Rick Gault to work in the "bone yard" where no power, heat or light was available because Gault "stonewalled" the work orders to install power to the site; (4) Hemingway was discriminatorily denied vacation time and days off; (5) Hemingway has only been assigned to the shift for one day despite his being shift qualified since September 1998, while less qualified, newer employees such as Cindy Pye, have been assigned to shift duty; (6) Hemingway has never been paid extra pay for shift qualification, despite complaints to Rick Gault; (7) Hawkins has continued to be criticized by Gault when Hawkins has called upon Gault to take appropriate action for H.P. Technicians' failure to comply with Radiation Safety Reviews drawn by Mr. Hawkins; and (8) Hawkins has suffered the chilling effect of the failure of Connecticut Yankee management to support his Radiation Engineering activities and safety concerns from July 1998 through the present time. Supplemental Statement of Facts at ¶¶ 6-7, 9-10, 13, 15-19.

1. Alleged Retaliatory Work Assignments

At their depositions, both Complainants were questioned regarding their allegations that Connecticut Yankee has discriminated against them by assigning them to hazardous and undesirable work. In response to these questions, Hemingway testified that he believed that the following work assignments constituted adverse retaliatory employment actions: (1) work in the pipe trench, RHR pit, bone yard and spent fuel building; (2) surveying trucks entering the power plant; (3) outside work in inclement weather; and (4) work under NRC scrutiny. Hemingway Deposition at 21, 185-195, 202-203, 207. Hawkins testified that Connecticut Yankee discriminated against him by making the following assignments: (1) work in the RWST tank; (2) work in the RHR pit; (3) performing an outdoor filter change during the winter; (4) work under NRC scrutiny; and (5) work in the pipe trench. Hawkins Deposition at 218-222, 230.

As an initial matter, I note that the evidence of record establishes that Hawkins' assignment the RWST tank and the outside filter change job both occurred well outside of the 180-day limitation period. In this regard, an April 21, 1998 memorandum between Connecticut Yankee officials indicates that Hawkins received his May 1998 pay increase in part because of his performance while assigned to the RWST tank:

> I am recommending that Bill Hawkins be upgraded in the Bartlett job classification to DB. This is based on his continual high job performance . . . the level of detail that Bill placed in the procedural development prompted me to assign him to the RWST draining, cleaning . . . and Instacoat application . . . This resulted in both jobs going extremely well.

Gault Affidavit, Exhibit B. Thus, it is clear that Hawkins was assigned to work in the RWST tank prior to July 4, 1998. Similarly, the evidence shows that Hawkins was assigned to perform the outside filter change, along with a Connecticut Yankee employee and Connecticut Yankee supervisor Rick Gault, during the winter of 1997-1998, long before the beginning of the limitation

period. Gualt Affidavit at ¶ 9. In the absence of any evidence from the Complainants that these assignments took place within the limitation period, I find that they may only be considered as part of a continuing violation in the event that the Complainants prove that the Connecticut Yankee maintained a discriminatory policy or practice, and that there was an action taken pursuant to that policy or practice during the statutory limitation period

Regarding the assignments to the pipe trench, Hawkins testified at his deposition that he was the first Health Physics Technician who was sent into the pipe trench to investigate the chemical spill. He did not know why he was selected but acknowledged that the decision could have been based on his skills and the fact that he was highly regarded as a technician. He further testified that several other Health Physics Technicians were sent into the pipe trench to respond to the chemical spill and that he was not the only one exposed to danger before a hazardous material team was called to the area. Hawkins Deposition at 254-260. Hawkins was unsure whether Doug Roberson or Rick Gault had assigned him to work in the pipe trench, but he stated that he did not believe that Roberson would ever retaliate against him. *Id.* at 261-62. Hemingway testified that he was assigned to work in the pipe trench by Roberson and Gault after Hawkins had performed the initial survey. He stated that he was not alleging that Roberson had retaliated against him because of his protected activities; however, he testified that believed Gault had retaliated against him because Gault assigned him to accompany other Health Physics Technicians who were only required to make one or two two-hour dives into the pipe trench during a shift while he spent the entire shift in the area. He also testified that he was the only Health Physics Technician who was required to work in the pipe trench during the day shift. Hemingway Deposition at 186-192.

Hawkins and Hemingway both acknowledged that the work they performed in the pipe trench was within the scope of their duties as Health Physics Technicians and that other Health Physics Technicians would have been required to perform the work if they had not been assigned to the pipe trench. Indeed, they acknowledged that all of the assignments which they have alleged to be retaliatory were within the scope of a Health Physics Technician's duties, that other Health Physics Technicians performed the same or similar assignments, and that none of these assignments involved any loss of pay, diminution of responsibility or demotion. Hemingway Deposition at 141-142, 189-191, 194-195, 202, 207, 280-281; Hawkins Deposition at 218-225, 328. More particularly, Hemingway acknowledged that other Health Physics Technicians were assigned to work outside in inclement weather and every Health Physics Technician during the periods in question worked under heightened NRC scrutiny. Hemingway Deposition at 124-125, 156-158, 278-281. Both Complainants also testified that no Connecticut Yankee official had made any statement linking their protected activities to any of the allegedly retaliatory work assignments. Hemingway Deposition at 143-145; Hawkins Deposition at 221-222. Neither could identify any facts, other that the assignments themselves, to support their allegation that these assignments were retaliatory. Rather, they conceded that they simply based their allegations on the belief and assumption that the assignments were made in retaliation for their protected activities. Hemingway Deposition at 191-192, 204; Hawkins Deposition at 221.

In support of its motion for summary decision, Connecticut Yankee submitted documentary evidence and affidavits from Connecticut Yankee officials in addition to the deposition testimony of the Complainants. Rick Gault, the supervisor of radiation protection in the Health Physics Department, stated in his affidavit that assignments are made in a manner to ensure productive and efficient completion of Health Physics work and that Hemingway and Hawkins performed normal Health Physics duties similar to the duties assigned to other Health Physics Technicians. He further stated that work assignments are based on availability, skills and the need to complete the job and that he assigned particularly difficult and safety-sensitive jobs to Hawkins because he had a high level of confidence in Hawkins's abilities and believed that he would perform the work safely and efficiently. Gault Affidavit at ¶ 28. Gault denied that he ever based any assignment on the Complainants' protected activity, and he asserted that he never considered their protected activity as a factor when making job assignments. *Id.* at ¶ 32.

Richard Sexton, Connecticut Yankee's Health Physics and Safety Manager, Department. He further stated in his affidavit that a health Physics Technician's duties frequently require work in confined and uncomfortable conditions with exposure to occupational hazards in such areas as the containment area, the pipe trench, the residual heat removal ("RHR") pit, the refueling waste storage tank ("RHST"), the primary auxiliary building and the RCA yard. Sexton Affidavit at ¶ 7. He further testified that Health Physics Technicians conduct routine surveys which are often performed outside in the elements on vehicles and equipment entering and leaving the site and that many routine plant operations such as filter change-out, valve operations and maintenance are performed outside and require support of Health Physics Technicians. *Id.* at ¶ 6. He too denied that the Complainant's protected activity had ever been a factor in any employment decision. *Id.* at ¶ 25.

The evidence offered by Connecticut Yankee additionally shows that during the time frame covered by the complaint, Hemingway received Spot Recognition awards in February 1998 ($100.00) and in May 1999 ($200.00) and a pay increase in April 1998, and Hawkins received a $200.00 Spot Recognition award in October 1998 and pay increases in May and June 1998. Sexton Affidavit at ¶¶ 16, 20; Connecticut Yankee Consolidated Exhibit Binder, Exhibit G. Connecticut Yankee's evidence also shows that 26 of 28 Bartlett Health Physics contract employees were laid off from the Connecticut Yankee plant between October 1996 and January 1, 1997 and that Hawkins was the last employee to be laid off on January 31, 1997, leaving only Hemingway who was retained based on his earlier starting date. Connecticut Yankee Consolidated Exhibit Binder, Exhibit I. Finally, Connecticut Yankee's evidence shows that Hemingway was promoted to Lead Health Physics Technician with a corresponding pay increase in November 1996. Sexton Affidavit at ¶ 20.

The foregoing discussion of the evidence shows that the Complainants have not produced any evidence, aside from the fact that they were given various work assignments, to support their allegations that these assignments constituted retaliation for their protected activities. Connecticut Yankee, on the other hand, has produced evidence in the form of the affidavits and the Complainants' own deposition testimony which establishes that the complained of assignments involved duties normally assigned to Health Physics Technicians, that other Health Physics

Technicians were given the same or similar assignments and worked under the same or similar conditions and that other Health Physics Technicians would have had to perform the Complainants' work if they had not been given the assignments in question. Connecticut Yankee's evidence also establishes that the Complainants were the beneficiaries of favorable employment actions in the form of awards and pay increases during the same period when they were allegedly experiencing discriminatory treatment and that, to the extent that the Complainants were given more difficult or sensitive assignments, such assignments were based on their superior qualifications and experience. The Complainants have alleged no facts to rebut Connecticut Yankee's evidence which shows that their work assignments were made for legitimate, non-discriminatory reasons and not in retaliation for their protected activities. Instead, they rely only of a belief that the assignments were retaliatory. While the Complainants may well be sincere in their belief that they are victims of retaliatory adverse work assignments, a mere sense that one has been wronged does not constitute the affirmative evidence that is necessary to defeat a motion for summary judgment. *See, Pantanizopoulos v. Tennessee Valley Authority*, 96-ERA-15 (ARB October 20, 1997), slip op. at 5. Under these circumstances, and even accepting all of the facts alleged by the Complainants as true and viewing those facts in a light most favorable to the Complainants, I must conclude that the Complainants have presented no genuine issue of material fact for hearing with respect to their work assignments and that

Connecticut Yankee is, therefore, entitled as a matter of law to summary decision in their favor on these issues.[5]

2. Alleged Discriminatory Employment Actions Affecting Hemingway

Hemingway alleges that Connecticut Yankee discriminated against him by not training him for shift qualification, assigning less qualified and less senior employees to the shift while only assigning him to the shift for one day since September 1998 when he became shift qualified, and by not paying him extra for shift work. Connecticut Yankee's evidence shows that it is obligated by the terms of its labor agreement to ensure that its own employees are shift qualified, but it is under no obligation to train contract employees for shift qualification, and it does not pay its contract employees extra for shift work. Gault Affidavit at ¶ 24; Sexton Affidavit at ¶ 17. At his deposition, Hemingway conceded that Connecticut Yankee is not obligated to train contract employees to become shift qualified. Hemingway Deposition at 198. He stated that he thought that Doug Roberson had become shift qualified before he did in September 1998, but he was unsure when Roberson completed shift qualification training or whether it also could have been in September 1998. *Id*. at 198-199. Hemingway testified that he considered the fact that he was only assigned to a shift once in September 1998 to be retaliatory, although he stated that he had subsequently been assigned to work a shift. *Id*. at 214. He further testified that Connecticut Yankee does not pay Bartlett to have contract employees shift qualified and that no contract employees, including himself and Cindy Pye, had been paid extra for shift work, yet he still insisted that it was discriminatory not to give him extra pay. *Id*. at 215-216. While Hemingway testified that it was his belief that he had not been trained for shift qualification because of his protected activities, he could not identify any facts to support his belief. *Id*. at 201. He also admitted that he had no evidence to show that the fact that he did not receive extra pay for shift work was in retaliation for protected activities. *Id.* at 217.

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[5] In arriving at this conclusion, I considered the allegedly retaliatory job assignments against the background of the Hawkins lay-off and transfer to Radiation Engineering and Connecticut Yankee's decision not to hire either of the Complainants as full-time Health Physics employees as these time-barred actions may shed light on the motivation behind the challenged job assignments. *McCuiston*, slip op. at 10-11. However, the evidence submitted concerning these actions does not establish any discriminatory pattern which would cast suspicion on the legitimacy of the job assignments. As discussed above, the uncontradicted evidence establishes that Hawkins was the last of 27 Health Physics Technicians to be laid off and that Hemingway was the only Health Physics Technician to escape the lay-off because he had greater seniority than Hawkins. The undisputed evidence regarding the transfer shows that it was initiated at Hawkins's request and resulted in a promotion and a pay increase. When confronted at his deposition with the incongruity of his allegation of retaliation in light this evidence, Hawkins bizarrely insisted that Connecticut Yankee's conduct in essentially accommodating his wishes amounted to an attempt to force him to resign by "reverse psychology". Hawkins Deposition at 253. Finally, Connecticut Yankee produced evidence which the Complainants have not contradicted, that Doug Roberson was hired over the Complainants and three other Health Physics Technicians based on his superior qualifications under legitimate criteria which were uniformly applied to assess all applicants. Affidavit of Marie Sankowski at ¶¶ 3-6; Hemingway Deposition at 180-182.

Hemingway also complains that he was discriminatorily denied vacation time and days off. The allegation regarding days off arises from an incident in September 1998 when Hemingway states that Rick Gault scheduled for a fire drill assignment on a Friday which is not a scheduled work day for Health Physics Technicians. Hemingway testified that participation in three or four fire drills per year is required to maintain shift qualification, and he did not know whether any other contract Health Physics Technicians were scheduled to participate in the Friday drill. He further testified that Gault gave him the option of participating in the drill on an evening which he did so that he did not have to report for the drill on Friday after all. Although he maintained that Gault scheduled the fire drill for a Friday to retaliate against him, he could offer no facts to substantiate his allegation. Hemingway Deposition at 210-213. Regarding the vacation time allegation, Hemingway testified that he asked Gault for time off in January 1998, and Gault told him that he did not think he could have the time off because they were going to be busy. Hemingway did not know whether any other employees were given time off in January 1998, and he stated that he later got a week off in April 1998 by going to another manager, Jay Tarzia. Hemingway asserted that he never heard of another employee being denied time off and that the denial of vacation time in January 1998 was discriminatory because there was no other reason for the denial, but he again was unable to offer any facts to support his belief. *Id.* at 207-210.

The undisputed evidence shows that Hemingway was treated no differently than any other similarly situated contract Health Physics Technician in regard to shift qualification, shift assignment, shift pay, days off and fire drill scheduling. While he was denied time off in January 1998, he has offered no evidence, aside from his own unsubstantiated testimony that he knew of no other employees who had been denied time off, which would support an inference that Connecticut Yankee made this decision in retaliation for his protected activities. If any inference is to be reasonably drawn from the scant evidence in the record on this issue,[6] it would be that the denial of time off in January 1998 was for legitimate work-related reasons as asserted by Connecticut Yankee since Hemingway was granted a week off in April 1998. After accepting all of the facts alleged by the Complainants as true and viewing those facts in a light most favorable to the Complainants, I conclude that the Complainants have presented no genuine issue of material fact for hearing with respect to these employment decisions involving Hemingway's shift qualification, shift assignments, shift pay, days off and vacation time. Accordingly, Connecticut Yankee is entitled as a matter of law to summary decision in their favor on these issues.

3. Alleged Discriminatory Employment Actions Affecting Hawkins

The final allegations in the complaint which fall within the 180-day limitation period are (1) that Hawkins has continued to be criticized by Gault when Hawkins has called upon Gault to take appropriate action for H.P. Technicians' failure to comply with Radiation Safety Reviews

[6] It is noted that the absence of supporting evidence is not due to lack of discovery. *Compare, Holden v. Gulf States Utilities*, 92-ERA-44 (Sec'y April 14, 1995) (summary decision not appropriate where complainants were deprived of evidence to rebut respondent's motion due to respondent's failure to cooperate in complainants' completion of discovery). Here, the record shows that the Parties have had ample opportunity to engage in discovery, and the Complainants have not alleged that the Respondents have failed to cooperate in discovery or to comply with any orders issued by Judge Donnelly.

drawn by Mr. Hawkins and (2) that Hawkins has suffered the chilling effect of the failure of Connecticut Yankee management to support his Radiation Engineering activities and safety concerns from July 1998 through the present time. The Complainants have offered minimal evidence in support of these allegations. In his affidavit, Hawkins stated:

> 30. I was subjected to harassment and intimidation by CY Health Physics Management when I attempted to insist upon procedural compliance in the conduct of Health Physics investigations.
>
> * * * * *
>
> 34. Each CY Health Physics Technician, either contractor or employee, were [sic] given specific notice that they were to comply with all procedures in existence for the conduct of Health Physics activities.
>
> 35. Thereafter, I was directed to ignore procedural compliance when it was inconvenient to the time schedule of CY Health Physics management.
>
> * * * * *
>
> 39. I was continued [sic] to be criticized by Mr. Gault when I called upon Mr. Gault to take action appropriate action [sic] such as the creation of ACRs for discipline for Health Physics Technician's failure to comply with RAD Safety Reviews prepared by me.
>
> 40. I have suffered the chilling effect of the failure of CY management to support its Radiation Engineering activities and safety concerns in July 1998.

Hawkins Affidavit at ¶¶ 30,34,35,39,40. Allegations of this nature which do not involve "tangible job detriment" are appropriately considered under the "hostile work environment" analysis articulated by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and refined in *Harris v. Forklift Systems, Inc*., 510 U.S. 17 (1993). *Varnadore v. Oak Ridge National Laboratory,* 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 and 3, 95-ERA-1 (ARB June 14, 1996), slip op. at 9. In *Harris,* which arose under Title VII of the Civil Rights Act of 1964, the Court considered the question of when employer conduct which does not result in tangible job harm is sufficiently egregious to be actionable, and it elected to middle road between making actionable any conduct that is offensive to an employee and requiring the conduct to cause a tangible psychological injury:

> This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in Meritor, "mere utterance of an ... epithet which engenders offensive feelings in a employee," ibid. (internal quotation marks omitted) does not sufficiently affect the conditions of employment

> to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

510 U.S. at 21-22. Connecticut Yankee asserts that Hawkins has proffered no material, probative facts to support his generalized allegations of harassment and intimidation. Connecticut Yankee Brief in Support of Motion for Summary Decision at 30. After careful review of the entire record, I must agree. Beyond the broad allegations quoted above from his affidavit, Hawkins has offered nothing in the way of facts which, when viewed in a light most favorable to the Complainants, would support a finding that Connecticut Yankee engaged in such severe and pervasive conduct directed toward his protected activity as would create what any reasonable person would perceive as an objectively hostile or abusive work environment. Indeed, in his lengthy deposition testimony, Hawkins only identifies two incidents which would appear to be related to these allegations. In one incident, Hawkins testified that Gault failed to completely brief two technicians on required procedures, which Hawkins had apparently written, resulting procedural non-compliance. Hawkins Deposition at 250-252. In the second incident, which Hawkins characterized as having a "chilling effect", he testified that he informed management officials Jay Tarzia and Dick Sexton that there were problems with a dive that was scheduled to take place the following day which could result in issuance [by the NRC] of a corrective action letter, and that he was ashamed to be a part of an Health Physics group that was running around like decapitated chickens. According to Hawkins, Tarzia and Sexton responded that they were going to do what they wished and that he would do as he was told. He further testified that management proceeded with the dive and, when he reported that several criteria for terminating the dive were present and that they were not operating in verbatim compliance with the dive procedure, Tarzia and Gault refused to terminate the dive and stated that they would write an ACR the next day stating that the procedure did not work. *Id*. at 264-266. When asked how this incident affected him, Hawkins replied,

> A. I'm working as an HP tech, trying to do my job, follow procedures, and I'm being told by my supervisors and managers don't follow the procedures. That's bad. How could I do a job and follow the procedure when the supervisor and manager – why have a procedure if I'm being told not to follow it? So I think as far as verbatim compliance, as I have been told, you're going to lose your job, you have 60 days, the stuff that I had seen, follow procedures or else, I'm following procedures and my supervisors and management says don't follow them. I feel that should be enough.

Id. at 266. While disregard of procedures designed to ensure the health and safety of employees as well as the general public can not be condoned, and while I am sympathetic to the frustration that Hawkins must have experienced at what appeared to him to have been a blatant example of management misconduct, these incidents, which I have assumed to have occurred as described by Hawkins, are not enough and fall well short of the type of severe and pervasive conduct necessary to create an environment that is objectively hostile and abusive toward protected activity. That is, the facts, viewed in a light most favorable to the Complainants, don't even remotely approach a showing that the Connecticut Yankee plant was a "workplace is permeated with . . . discriminatory intimidation, ridicule, and insult . . . that is . . . sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment . . .." *Harris*, 510 U.S. at 21 (citations and internal quotations omitted). Therefore, I find that the Complainants have not demonstrated that there is a genuine issue of material fact present to justify allowing their allegations of intimidation and harassment to proceed to hearing.

Lastly, Hawkins also stated in his affidavit that he had requested Fire Brigade training but was not allowed to attend while other Bartlett contract employees with less Connecticut Yankee experience were allowed to attend. Hawkins Affidavit at ¶ 30. Although this allegation is not raised in the complaint or in the supplemental statement of facts, it is considered properly before me as it was covered at Hawkins's deposition and addressed by Connecticut Yankee in its motion for summary decision. *See, MacLeod v. Los Alamos National Laboratory*, 94-CAA-18 (ARB April 23, 1997), slip op. at 7-8, citing *Yellow Freight Systems, Inc. v. Martin*, 954 F.2d 353, 358-59 (6th Cir. 1992) (unpleaded issue may be tried by implied consent). A discriminatory denial of training can constitute an actionable adverse employment action. *Studer v. Flowers Baking Company of Tennessee, Inc.*, 93-CAA-11 (Sec'y June 19, 1995), slip op. at 3. The motion for summary decision is supported by the affidavit of radiation protection supervisor Gault who stated that he offered Hawkins an opportunity to attend fire brigade training and that Hawkins abandoned his pursuit of the training when he learned that it would not result in a wage increase. Gault Affidavit at ¶ 23. Hawkins denied at his deposition that he had ever received an "offer" of fire brigade training from Gault. Rather, he testified that Gault has asked him, along with Hemingway and Doug Roberson, to indicate when they wanted to schedule their shift qualification training which included the fire brigade training. Hawkins Deposition at 243-244. However, he did not contradict Gault's statement that he had abandoned his pursuit of the

training when he discovered that it would not net him a wage increase. In this regard, Hawkins testified:

> A. I was asked, like I said, two time. I was asked by Mr. Gault, myself and Mr. Hemingway and Mr. Roberson, to decide what we wanted for money and everything else, to decide when we wanted to go.
>
> Q. Did you give an answer?
>
> A. Yes.
>
> Q. What was your answer?
>
> A. We discussed, both Shae [Hemingway] and I and Doug Roberson, that we wanted more money, equivalent to the house technicians, and any incentive bonuses that the rest of the contractors, contractors might be offered during the decommissioning.

Id. at 244. Hawkins acknowledged that Connecticut Yankee was under no obligation to have contract Health Physics Technicians attend fire brigade training or to send him for training, and he could not identify any other contract Health Physics Technician who had ever negotiated with Connecticut Yankee for the same pay and other terms and conditions of employment as enjoyed by regular Connecticut Yankee employees. *Id*. at 244-245. Viewed in a light most favorable to the Complainants, the evidence shows that Hawkins and Hemingway were treated with respect to fire brigade training in the same manner as another similarly-situated individual, Doug Roberson who ironically is identified by the Complainants as the beneficiary of Connecticut Yankee's discriminatory decision not to hire either of them for the full-time Health Physics Technician position. The Complainants have offered no evidence that they were treated differently with respect to training and compensation, and Hawkins has not contradicted Gault's statement that he abandoned his interest in the fire brigade training when Connecticut Yankee declined to pay him (or any other contract Health Physics Technician) for attending such training. Under these circumstances, it is clear that the Complainant's have not presented any genuine issue of material fact in connection with this allegation.

III. Conclusion

Having determined for the reasons discussed above that the Complainants have not set forth specific facts showing that there is a genuine issue for trial, I conclude that the Respondents are entitled to summary decision.

IV. Order

The motions for summary decision filed by Northeast Utilities and Northeast Nuclear Energy Company and by the Connecticut Yankee Atomic Power Company are GRANTED, and the hearing currently scheduled for the week of May 15, 2000 is CANCELED. Further, IT IS RECOMMENDED that the complaint filed in this matter be dismissed in its entirety.

_____

Daniel F. Sutton
Administrative Law Judge

Camden, New Jersey

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).